78-302

No._____

Supreme Court, U. S.
FILED
AUG 22 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHN F. WARD, JR.
1111 South Foster Drive, Suite C
Post Office Box 65236
Baton Rouge, Louisiana 70896
(504) 923-3462

ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Citations to Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Statutory Provisions	3
Statement of the Case	3
Statement of the Facts	8
Reasons for Granting the Writ	13
Conclusion	26
Certificate	27
Appendix A	28
Appendix B	42

TABLE OF AUTHORITIES

Cases: PAGE

Austin Independent School District v. United States, ___ U.S. ___, 50 L.Ed. 603, ___ S.Ct. ___ (1977) 13

Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (Brown I-1954) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083) Brown II-1955) 3

Bush v. Orleans Parish School Board, United States District Court, Eastern District of Louisiana, CA No. 3630 13

Calhoun v. Cook, 522 F.2d 717, rehearing and rehearing en banc denied, 525 F.2d 1203 13

Carr v. Montgomery County Board of Education, 377 F. Supp. 1123, affirmed 511 F.2d 1374 (5th Cir.), rehearing and rehearing en banc denied, cert. denied, 96 S.Ct. 397, 423 U.S. 986, 46 L.Ed.2d 303 13

Dayton Board of Education v. Brinkman, ___ U.S. ___, 53 L.Ed.2d 851, 97 S.Ct. ___ (June 27, 1977)..... 13

Green v. County School Board of New Kent County, 1968, 381 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716..... 12

Hall v. St. Helena Parish School Board, 417 F.2d 801..... 4

Horton, et al. v. Lawrence County Alabama Board of Education, No. 77-2937 (5th Circuit) 13

Milliken v. Bradley, 418 U.S. 717, 41 L.Ed.2d 1069, 94 S.Ct. 3112 13

Pasadena City Board of Education v. Spangler, 427 U.S. 424, 49 L.Ed.2d 599, 96 S.Ct. 2697 (1976) 13

Singleton v. Jackson Separate School Systems, en banc, (5th Cir., 1970) 419 F.2d 1211 4

PAGE

United States v. Jefferson County Board of Education, 1966, 372 F.2d 836 (Jefferson I) affirmed on rehearing en banc 1967, 380 F.2d 385 (Jefferson II) cert. denied, 389 U.S. 840.. 4

Village of Arlington Heights v. Metropolitan Housing Development Corporation, ___ U.S. ___, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977) 13

Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976) 13

Statutes:

United States Constitution, Fourteenth Amendment..... 3

Treatises:

"Teacher Effectiveness", Smith, Dr. Fred M. and Gremillion, Dr. J. B.; February, 1971; Louisiana School Boards Association and Bureau of Educational Material and Research of the College of Education, Louisiana State University 22

No._____

In the
Supreme Court of the United States

OCTOBER TERM, 1978

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 7, 1978, rehearing denied May 25, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Louisiana is unreported and appears herein as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit is also not yet reported and appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 7, 1978. A timely application for rehearing was denied on May 25, 1978 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in disregarding the District Court's twelve page opinion as to facts and law merely because the District Court failed to make specific findings of fact and conclusions of law as to certain allegations of plaintiff's complaint under the circumstances of this case where:

A. The District Court had declared the system to be unitary in 1970 after implementation of a desegregation plan devised by a bi-racial committee; and
B. Upon the filing of the instant complaint by plaintiff-intervenors, the District Court appointed an outside expert to review the operation of the school system as to its continued unitariness and such Court appointed expert found the system to be still unitary; and
C. The plaintiff-intervenors produced virtually no evidence with regard to any of the allegations of their complaint and no evidence, whatsoever, with respect to many of the allegations of their complaint, and
D. The District Court opinion clearly finds in favor of defendants on the issues.

STATUTORY PROVISIONS

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The East Baton Rouge Parish School System as operated by the School Board, its Superintendent and staff during the past seven or eight years, has been, and is, the most progressive public school system in this state and possibly in the Fifth Circuit. As decisions of this Court and the Courts of Appeal made clearer, step-by-step and year-by-year, the requirements of public school systems in carrying into effect the spirit and letter of the law under the Fourteenth Amendment to the United States Constitution and the decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873 (Brown I-1954) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (Brown II-1955), this School Board and school system were generally moving forward in advance of such decisions. For

example, it studied both the Orleans Parish School System and the Atlanta School System as being relatively comparable metropolitan school systems and adopted some of the plans and provisions already being utilized by those two systems. The last time this school system has been before this Court on this issue was in 1966 as one of several school boards from several states in this circuit in *United States v. Jefferson County Board of Education*, 1966, 372 F.2d 836 (Jefferson I) affirmed on rehearing en banc 1967, 380 F.2d 385 (Jefferson II) cert. denied, 389 U.S. 840. After rendition of the Jefferson decision, this School Board moved immediately to implement each and every provision of such decree.

Thereafter, with the advent of the decisions of the Fifth Circuit in *Hall v. St. Helena Parish School Board*, 417 F.2d 801, and *Singleton v. Jackson Separate School Systems*, en banc, (5th Cir., 1970) 419 F.2d 1211, and even though this school system was not directly involved in either of those cases, it again moved progressively forward to implement the spirit and letter of those decisions in its school system. For example, it was the first school system in Louisiana, and possibly in this circuit, to voluntarily appoint a bi-racial committee to assist it in desegregating its schools and converting to a unitary school system, and did so prior to decisions of this Court suggesting such procedure.

On December 18, 1969, the East Baton Rouge Parish School Board called together virtually all of the leaders of the black community for the purpose of obtaining their assistance in devising a desegregation plan which would meet constantly changing requirements and create a unitary school system for this community.

As a result of this meeting, the school board officially adopted, on that same day, a resolution creating an inter-racial steering committee composed of leaders in the black community selected by them, leaders in the white community and school board members.

This original parent bi-racial committee ultimately became known as the Public Education Study Committee. This parent bi-racial committee appointed two subcommittees; a Faculty Desegregation Subcommittee composed of ten white citizens and ten black citizens and a Student Desegregation Sub-Committee composed of 26 citizens, twelve of whom were white, thirteen of whom were black, and one of whom was oriental. Although the cited portion of the record indicates that the bi-racial committee was created after the issuance of the court's order of January 16, 1970 (issued as a result of this court's decision in *Hall* and *Singleton*, supra) the Public Education Study Committee was actually created on December 18, 1969 and had already met three times and established its subcommittees prior to the District Court's January 16, 1970 order.

During the next six months the Public Education Study Committee held twenty meetings, the Faculty Desegregation Subcommittee held six meetings and the Student Desegregation Subcommittee held ten meetings. These meetings resulted in the Public Education Study Committee recommending to the school board a new plan designed to create a unitary school system in all respects including faculty, staff, transportation, extra-curricular activities, student body composition and school facilities as required by the most recent decisions of this Court and the Court of Appeals. This plan

proposed by the bi-racial committee was adopted by the school board and proposed to the District Court without change except to accede to the request of the black and white high school student councils that graduating seniors be permitted to remain at their present school for the next school year, their senior and final year in high school.

This plan of the bi-racial committee and school board was approved and ordered implemented for the 1970-71 school year by the District Court's opinion and order of July 22, 1970 without objection from plaintiffs or intervenors and no appeal was taken therefrom. The East Baton Rouge Parish School System has operated in compliance with that order since that date.

Subsequently, on April 2, 1971, plaintiffs and intervenors filed a Motion for Further Relief and noticed same for hearing. On July 25, 1971, by agreement of the parties, the questions raised in the 1971 motion were referred to the Bi-Racial Committee for consideration.

Two years later, on June 7, 1974, present counsel for intervenors was added as additional counsel of record for intervenors and filed a new Motion for Further Relief accompanied by voluminous interrogatories and request for admission of facts. Due to the great volume of information requested by intervenors' interrogatories and request for admissions, defendants were granted an extension of time to file answers thereto, which answers and exhibits, were filed with the Court on May 31, 1974, intervenors' motion being set for hearing on August 2, 1974. On August 1, 1974 defendants filed a motion to upset the hearing and requesting the Court to refer Intervenors' Motion for Further Relief to the Bi-Racial

Committee which motion was also set for August 2, 1974. At the beginning of the hearing, the District Court denied Defendants' motion to upset the hearing and proceeded to hear Intervenors' Motion for Further Relief, reserving ruling on the motion to refer to the Bi-Racial Committee. At the completion of the hearing on Intervenors' Motion for Further Relief, the Court ordered the matter submitted.

Thereafter, on August 14, 1974, the District Court issued an order indicating the Court's feeling that it needed the assistance of outside educational experts to assist the Court in resolving the issues before the Court, and appointing the Louisiana Educational Laboratory as such outside educational expert. The order further required such experts to submit an interim report to the Court as to any immediate steps that might be needed by January 1, 1975. It further required a final report by March 1, 1975 (later extended to May 1, 1975) with the fees of the experts to be assessed as costs (later determined to be $27,949.89 and paid by the School Board).

Intervenors noticed an appeal from such order on August 26, 1974 but after clarification by the Court by minute entry of September 23, 1974 that this was not a final order and that their motion was still pending intervenors withdrew their appeal. On January 17, 1975, the interim report of LEL (previously filed with the Court) was filed in the record. On February 26, 1975 the District Court, based on the LEL interim report, issued "Finding and Interim Order" directing immediate implementation of certain LEL interim recommendations including converting the Bi-Racial Committee to a Court appointed committee and referring the faculty reas-

signment problem (a primary complaint of intervenor) to such committee for study. On March 26, 1975 intervenors noticed their appeal from the February 26, 1975 Interim Order. On April 25, 1975, intervenors again voluntarily dismissed their appeal.

In the meantime, LEL filed its final report with the Court on April 28, 1975 and on May 4, 1975 the Court issued a minute entry directing service of the LEL final report on the parties and setting intervenors motions for hearing on June 16, 1975, later changed to June 18, 1975. At the conclusion of the hearing, the Court took the matter under advisement ordering briefs and proposed orders from both sides within ten days. After briefs had been submitted, the District Court rendered its Opinion and Judgment on August 21, 1975 denying Intervenors Motions, finding the East Baton Rouge Parish School System to still be unitary and dismissing the complaint. Intervenor then noticed an appeal on September 17, 1975.

On appeal, the Court of Appeals reversed the District Court's decision and remanded with directions to the District Court to hold further hearings on the issues and to make specific findings of fact and conclusions of law with respect thereto and virtually directed pairing and clustering of schools to eliminate any predominantly one-race schools.

STATEMENT OF FACTS

East Baton Rouge Parish is a large metropolitan area located on the Mississippi River approximately 90 miles north of New Orleans. Within its boundaries are the City of Baton Rouge, the capitol city of the State of

Louisiana, and two smaller incorporated towns located approximately 10 and 15 miles north of the City of Baton Rouge, Baker and Zachary. It is second only to New Orleans in population and similar to New Orleans in many respects. The present population of the parish is 350,400; the population of the City of Baton Rouge is approximately 204,897; the population of the town of Baker is approximately 8,000 and the population of the town of Zachary is approximately 5,000.

The parish is geographically large containing 468.35 square miles made up of the urban city of Baton Rouge, a suburban area and a rural area. East Baton Rouge Parish is bounded on the west by the Mississippi River, on the north by West and East Feliciana Parishes, on the east by Livingston Parish and on the south by portions of Ascension and Iberville Parishes. The parish measures on a straight line, 35 miles from north to south and something over 20 miles from west to east.

The school system in East Baton Rouge Parish is a parish-wide school system and there are no separate city school systems. The school board presently operates a total of 113 schools serving over 70,000 students and employing approximately 3500 teachers. The racial composition of the parish is approximately 65 percent white and 35 percent black.

Black citizens of the community reside primarily in a north-south belt located in the west central part of the parish, the older part of the city. This belt runs from just north of the Louisiana State University campus on the south through the City of Baton Rouge, the unincorporated community of Scotlandville (in which Southern

University is located) and northward through the smaller towns of Baker and Zachary which are in the rural area of the parish. As population movement to the west is cut off by the Mississippi River, population movement and growth has been primarily to the east although somewhat to the north and south. As is the case with any metropolitan area, as the older inner city became less residential and more commercial in nature, with the corresponding higher crime rate, the people, both black and white, have moved out primarily eastward.

Because of this deterioration and commercialization of the older inner city and the consequent movement east, north and south of the more affluent black and white citizens, leaving behind the lower socioeconomic groups both blacks and white, we do have a few schools which might be considered as be racially identifiable because of their student body composition. Conversely, this eastward movement has also resulted in a few of the schools on the far eastern boundary of the parish being predominantly white. This north, south and primarily eastward population movement due to the commercialization and deterioration of the old inner city and the desire of various groups to live together was supported by the testimony of plaintiffs' own witness, Dr. John Moland, Jr., professor of sociology and research at Southern University. However, as found by the experts appointed by the Court, the great majority of our schools are well integrated and the faculty of each school has substantially the same ratio of black and white teachers as the overall parish-wide ratio of approximately 65 percent black and 35 percent white.

An examination of typical student body composi-

tions of schools in East Baton Rouge Parish, starting on the south and moving northward, reveals the following:

NAME OF SCHOOL	% BLACK	% WHITE
Southdowns Elementary	21.1	78.9
University Terrace Elementary	84.6	15.4
Walnut Hills Elementary	43.7	56.3
Highland Elementary	10.1	89.9
Magnolia Woods Elementary	15.3	84.7
Kenilworth Junior High School	27.0	73.0
Valley Park Junior High School	26.9	73.1
South East Junior High School	4.1	95.9
Tara Senior High School	11.0	89.0
Robert E. Lee High School	18.3	81.7
Westdale Elementary	39.2	60.8
Broadmoor Elementary	.7	99.3
Goodwood Elementary	5.7	94.3
Highland Elementary	10.1	89.9
Lanier Elementary	15.6	84.4
Melrose Elementary	41.4	58.6
Mayfair Elementary	40.9	59.1
Merrydale Elementary	16.5	83.5
Mohican Elementary	52.0	48.0
Bernard Terrace Elementary	38.7	61.3
Brookstown Elementary	8.9	91.1
Choctaw Elementary	72.6	27.4
Claiborne Elementary	27.6	72.4
Dalton Elementary	66.5	33.5
Delmont Elementary	54.8	45.2
Forest Heights Elementary	39.1	60.9
Howell Park Elementary	39.5	60.5
Capitol Junior High School	99.7	.3
Westdale Junior High School	38.5	61.5
Istrouma Junior High School (formerly all white)	86.5	13.5
Glen Oaks Junior High School	40.8	59.2
Baton Rouge High School (formerly all white)	66.7	33.3
Istrouma High School	25.5	74.5
Broadmoor High School	1.0	99.0

Moving on toward the north end of the parish through Scotlandville, Baker and Zachary:

NAME OF SCHOOL	% BLACK	% WHITE
Brownsfield Elementary	7.5	92.5
Ryan Elementary	99.8	.2
Glen Oaks Park Elementary	10.6	89.4
Hollywood Elementary	59.0	41.0
Bakerfield Elementary	31.9	68.1
Baker Heights Elementary	9.6	90.4
White Hills Elementary	5.9	94.1
Zachary Elementary	33.1	66.9
Northwestern Elementary	47.5	52.5
Northwestern Middle School	46.9	53.1
Baker Junior High School	23.3	76.7
Scotlandville Junior High School	100.0	0.0
Park Forest Junior High School	10.4	89.6
Prescott Junior High School	13.5	86.5
Glen Oaks Senior High School	22.0	78.0
Baker Senior High School	27.3	72.7
Zachary High School	49.1	50.9
Central High School	6.6	93.4
Pride High School	30.9	69.1

The East Baton Rouge Parish School Board respectfully submits that the type of figures shown above clearly indicate the unitariness of this school system. When these figures are combined with a completely desegregated faculty, transportation, extracurricular activities, equal facilities, etc. the other facets of a school system to be considered in inquiring into the desegregated status of a school system indicated by the Supreme Court in *Green v. County School Board of New Kent County*, 1968, 381 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716, there can be no doubt that the East Baton Rouge Parish School System has been, and is, a unitary school system. Also, the report of the Court appointed experts indicated that using an alternate method such as clustering schools would not have an appreciable effect upon the racial composition of the schools included in such clusters.

REASONS FOR GRANTING THE WRIT

The decision of the Court below, if not in direct conflict with recent decisions of this Court cited hereafter, direct the District Court to go so far beyond the limitations established by this Court's recent decisions in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 49 L.Ed.2d 599, 96 S.Ct. 2697 (1976); *Washington v. Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, U.S. , 50 L.Ed.2d 450, 97 S.Ct. 555 (1977); *Milliken v. Bradley*, 418 U.S. 717, 41 L.Ed.2d 1069, 94 S.Ct. 3112; *Austin Independent School District v. United States*, U.S. , 50 L.Ed. 603, S.Ct. (1977); and *Dayton Board of Education v. Brinkman*, U.S. , 53 L.Ed.2d 851, 97 S.Ct. (June 27, 1977) as to require review by this Court.

The decision of the Court of Appeals in this case also appears to be in conflict with other decisions of that Court such as *Carr v. Montgomery County Board of Education*, 377 F.Supp. 1123, affirmed 511 F.2d 1374 (5th Cir.) rehearing and rehearing en banc denied, cert. denied, 96 S.Ct. 397, 423 U.S. 986, 46 L.Ed.2d 303; *Calhoun v. Cook*, 522 F.2d 717, rehearing and rehearing en banc denied, 525 F.2d 1203 and *Bush v. Orleans Parish School Board*, CA No. 3630 declared unitary by District Court order of August 22, 1975 and noted with approval by the Fifth Circuit in its denial of rehearing in *Calhoun*, supra, and its more recent decision in No. 77-2937, *Horton, et al. v. Lawrence County Alabama Board of Education* (August 14, 1978).

The thrust of these recent decisions of this Court is that there are limits as to how far a lower court can go in fashioning remedies in school desegregation cases and that the remedy cannot exceed the constitutional violation. These decisions also recognize that predominantly one-race schools are not necessarily the result of constitutional violations but may result from residential impaction due to causes over which the local school board or State has no control, nor any responsibility for, and that such result, therefore, can not be imputed to the State or local school boards.

An examination of the East Baton Rouge Parish School System reveals that the few remaining predominantly one-race schools are due purely and solely to residential impaction caused by the kind of factors referred to in the above cited recent decisions of this Court. The evidence in the record in the District Court verifies this fact, even the testimony of plaintiffs' witnesses substantiated this condition, and the District Court, being "on the ground level" and familiar with Baton Rouge clearly found that this non-State action residential impaction is what causes the few predominantly one-race schools which exist in this school system.

If one moves from the south end of East Baton Rouge Parish on the west side of the Parish one will run into some predominantly black schools as you move through the old City on the west. But as you progress further northward past the old City of Baton Rouge and into the rural area along that same line you again run into completely integrated schools. If one proceeds from the south end of East Baton Rouge Parish on the far eastern side of the Parish one will run into some predom-

inantly white schools as you progress northward simply because there are very few black citizens who live in the eastern area of East Baton Rouge Parish. On the other hand, if one proceeds from the south end of the Parish through the central portion of the Parish to the north, every school is integrated and there are no predominantly one-race schools except in a few instances where a formerly all white school has now become a predominantly black school due to white citizens moving further east and black citizens moving from the old inner city on the west to the northeast. In all areas of East Baton Rouge Parish where white citizens and black citizens live in anything near to close proximity to each other, all of the schools are completely integrated.

It is only when you move to the extreme west side of the Parish where there are virtually no white citizens or to the extreme east side of the Parish where virtually no black citizens reside that you find any predominantly one-race schools. The only way to eliminate the few existing one-race schools would be to cross-town bus children from the extreme eastern area to the extreme western area of the Parish and conversely bus the children from the extreme western area to the extreme eastern area of the Parish and, to do so it would be necessary to jump already thoroughly integrated schools. The outside experts appointed by the District Court also found that clustering schools would have little appreciable effect on the racial identifiability of the schools. This was clear from the record and from the District Court's opinion and the Court of Appeals erred in not accepting the District Court's findings with respect thereto.

The thrust of these recent decisions of this Court, as they apply to the decision in this case and to the factual situation existing in East Baton Rouge Parish can best be summed up by the following language from Mr. Justice Powell's concurring opinion in *Austin*, supra, and the following language from *Dayton*, supra. In granting certiorari, vacating the Fifth Circuit's judgment, and remanding, Justice Powell's concurring opinion contains the following language:

> ". . . As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a *readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.* That Court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights. . . ." (emphasis added)

and

> " 'the task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, [a]s with any equity case, the nature of the violation determines the scope of the remedy.' Milliken v. Bradley, 418 U.S. 717, 736, 41 L.Ed.2d 1069, 94 S.Ct. 3112 1974), quoting Swann v. Charlotte-Mecklinberg Board of Education, 402 U.S. 1, 16, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971)."

Justice Powell's concurring opinion then goes on to note that,

> ". . . the principle cause of racial and ethnic imbalance in urban public schools across the country—north and south—is the imbalance in residential patterns. . . ."

and that,

> " . . .such residential patterns are typically beyond the controls of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. . . ."

and further that,

> " . . .economic pressures and voluntary preferences are the primary determinants of residential patterns. . . ."

In *Dayton*, supra, we also find this court saying,

> " . . .The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from *intentionally segregative actions* on the part of the Board. . . ." (emphasis added)

The Court also noted at page 861, that

> " . . .It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the constitution. Spenser v. Quegler, 404 U.S. 1027, 30 L.Ed.2d 723, 92 S.Ct. 707 (1972); Swann, supra, at 24, 28 L.Ed. 554, 91 S.Ct. 1267. . . ."

This is exactly the situation that prevails in East Baton Rouge Parish. It is a racially mixed community and it does have some schools that are either predominantly black or predominantly white. This is not, however, due to any segregative intent or action on the part of the local School Board but is due instead to existing

residential patterns and is not based on racial consideration. See also *Horton*, supra. Plaintiff-intervenors failed to present any evidence whatsoever to the contrary; the testimony of their own witness on cross-examination supported this residential pattern condition; the report and testimony of the outside experts appointed by the Court not only confirmed same but also found that the use of devices such as clustering of schools would have no appreciable effect on the racial composition of schools; and the District Court clearly found for the defendant School Board on this issue.

In addition, the other areas of school operation considered by the Courts in desegregation cases, faculty, transportation, facilities and extra-curricular activities, are completely integrated and no real complaint was raised by plaintiff-intervenors with regard to these issues. In any event, the Court appointed experts and the District Court found no constitutional violations with respect thereto.

For example, the ratio of black and white teachers in the system as a whole in 1970 was approximately 65% white and 35% black. Although this ratio has varied slightly from year to year, the overall ratio of teachers in this system today remains approximately the same. In 1970, pursuant to the desegregation plan formulated by the Bi-Racial Committee and implemented by the District Court in accordance with the Fifth Circuit decision in *Singleton*, supra, the School Board reassigned its teachers in each school so that the faculty in each school had substantially the same ratio of black and white teachers as the ratio of black and white teachers in the school system as a whole. And, today, for the 1978-79

school year, the faculty ratio at each school in the system is still substantially the same as the faculty ratio in the system as a whole.

For illustrative purposes, the schools heretofore listed with their student enrollment percentages by race, have the following percentage ratios of black and white teachers on their faculties:

NAME OF SCHOOL	FACULTY RATIO % BLACK	% WHITE
Southdowns Elementary	32	68
University Terrace Elementary	35	65
Walnut Hills Elementary	35	65
Highland Elementary	31	69
Magnolia Woods Elementary	33	67
Kenilworth Junior High School	33	67
Valley Park Junior High School	38	62
South East Junior High School	29	71
Tara Senior High School	28	72
Robert E. Lee High School	32	68
Westdale Elementary	30	70
Broadmoor Elementary	30	70
Goodwood Elementary	33	67
Highland Elementary	31	69
Lanier Elementary	33	67
Melrose Elementary	35	65
Mayfair Elementary	35	65
Merrydale Elementary	32	68
Mohican Elementary*		
Bernard Terrace Elementary	30	70
Brookstown Elementary	30	70
Choctaw Elementary*		
Claiborne Elementary	36	64
Dalton Elementary	37	63
Delmont Elementary	36	64
Forest Heights Elementary	40	60
Howell Park Elementary	40	60
Capitol Junior High School	44	56
Westdale Junior High School	30	70
Istrouma Junior High School	46	54

* Converted to Special Education Centers.

NAME OF SCHOOL	FACULTY RATIO % BLACK	% WHITE
Glen Oaks Junior High School	38	62
Baton Rouge High School	31	69
Istrouma High School	32	68
Broadmoor High School	31	69
Brownsfield Elementary	32	68
Ryan Elementary	44	66
Glen Oaks Park Elementary	33	67
Hollywood Elementary	42	58
Bakerfield Elementary	33	67
Baker Heights Elementary	31	69
White Hills Elementary	30	70
Zachary Elementary	30	70
Northwestern Elementary	36	64
Northwestern Middle School	42	58
Baker Junior High School	33	67
Scotlandville Junior High School	44	56
Park Forest Junior High School	32	68
Prescott Junior High School	35	65
Glen Oaks Senior High School	31	69
Baker Senior High School	31	69
Zachary High School	30	70
Central High School	31	69
Pride High School	32	68

Certainly, no reasonable man could argue that these schools do not have completely integrated faculties.

Plaintiff-intervenor did raise one additional issue which, to undersigned counsel's knowledge, is a brand new issue in desegregation cases. That issue is the distribution of more experienced—less experienced teachers, regardless of race, throughout the schools in the system. Although it may be true that some of the predominantly or majority black schools may have more less experienced teachers than some other schools, it is also true that some of the majority white schools will also

have more less experienced teachers than some other schools. Although it is very doubtful that the issue of more experienced versus less experienced teachers, regardless of race, rises to constitutional proportions or is even a question for judges rather than educators, we would point out that plaintiff-intervenors did not offer a single shred of evidence in the District Court with regard to this issue. Plaintiff-intervenors offered no evidence as to the average or mean experience of teachers in any schools in the Parish. In fact, that information is not readily available because the school system and its educators have never considered the experience of teachers in the system to be even an educational problem, much less a desegregation or judicial problem. The system has, however, recently run a small sampling of a few majority black and majority white schools selected at random which shows a variance in average or mean experience of only a low of 10.7 to a high of 11.13 as shown below:

ELEMENTARY SCHOOLS

SCHOOL	TOTAL EXPERIENCE	NUMBER OF TEACHERS	AVG. EXP. (mean)
(Majority Black)			
Alsen Elementary	155	13	11.9
Banks Elementary	306	31	12.1
Beechwood Elementary	161	17	9.4
			mean 11.13
(Majority White)			
Audubon Elementary	320	25	12.8
Baker Heights Elem.	438	36	12.1
Belingrath Hills Elem.	464	45	10.3
			mean 11.7

SECONDARY SCHOOLS

SCHOOL	TOTAL EXPERIENCE	NUMBER OF TEACHERS	AVG. EXP. (mean)
(Majority Black)			
Capitol High	700	65	10.7
McKinley High	650	64	10.1
Scotlandville High	614	54	11.3
			mean 10.7
(Majority White)			
Belaire High	802	79	10.2
Broadmoor High	977	70	13.9
Central High	751	70	9.3
			mean 11.1

Furthermore, plaintiff-intervenor introduced no evidence, by expert witness or otherwise, that experience is a real factor in teacher competence or that a less experienced teacher is less competent than a more experienced teacher. There is, however, at least one study which indicates that although a teacher's performance improves through her first three years of teaching it thereafter levels off and may even decline after fifteen to twenty years of teaching. This study was made by Dr. Fred M. Smith, Associate Professor and Director of Educational Research Bureau, College of Education, Louisiana State University, and Dr. J. B. Gremillion, Professor of Education and Chairman, Department of Education, Louisiana State University, and is entitled "Teacher Effectiveness" and was published in February, 1971 by the Louisiana School Boards Association and the Bureau of Educational Material and Research of the College of Education, Louisiana State University.

In any event, plaintiff-intervenors introduced no evidence in support of that allegation of their complaint and did not even discuss same at the hearing held by the

District Court. We would also respectfully suggest that this issue has no constitutional significance and if it deserves any consideration at all that consideration directs itself to educational interests rather than to the judiciary. The Court appointed experts obviously found no problem with this allegation; the District Court obviously found for defendants with respect thereto, and the District Court's judgment should be reinstated.

With respect to school construction, Baton Rouge is a rapidly growing metropolitan area with a constantly shifting population. The School Board must provide adequate facilities for these many new students as well as existing students who have moved their residence. Even today we are experiencing further overcrowding in areas where new schools have been constructed. As long as black citizens and white citizens in this nation continue to choose to build their homes, etc. in neighborhoods which are predominantly of their own race, we will continue to have some predominantly black and predominantly white schools.

In addition to being in virtual direct conflict with the cited recent decisions of this Court, or at least directing a remedy which goes so far beyond the limits established by those decisions of this Court so as to require review by this Court, the decision of the Court below also appears to be in direct conflict, or far out of line, with other decisions of that Court cited heretofore. In *Carr*, supra, the Court below approved a desegregation plan which contained at least as many, if not more, predominantly one-race schools, proportionately, as are found in the East Baton Rouge Parish School System. As noted, this Court also declined to review that plan by

denying certiorari. Furthermore, there can be no doubt but that the school systems in Atlanta, Georgia and New Orleans, Louisiana have far more predominantly one-race schools, particularly predominantly black schools, than does East Baton Rouge Parish. Although it may be true that the increase in the number of predominantly black schools in Atlanta and New Orleans may be the result of prior too far-reaching desegregation plans imposed by the Court below, such result serves as a road-sign as to the result to be expected from imposition of the similar remedies directed by the Court below in this case. Residential patterns in East Baton Rouge Parish have already begun to adjust themselves toward more homogeneity as exemplified by the large number of integrated schools that now exist including particularly those schools which were formerly all white and have now stabilized at 50-50 or with a slight white or black majority. Left alone to develop normally, the residential preferences of both black and white citizens will gradually and naturally change most of the predominantly one-race schools into schools with more mixed enrollments.

Defendants respectfully suggest that the Court below seriously erred in ignoring the report and findings of the Court appointed experts contained in the record, in rejecting the District Court's obvious findings and conclusions merely because they were not set forth in specific "1, 2, 3, 4" fashion, and in remanding to the District Court with directions which clearly direct the District Court to implement remedies which clearly go beyond the limits established by this Court in its recent decisions. Therefore, defendants would respectfully

suggest that certiorari should be granted, the judgment of the Court below vacated and the judgment of the District Court reinstated.

At the very least, defendants respectfully submit that certiorari should be granted to review the opinion and judgment of the Court below and, at the very least, to clarify same in light of this Court's recent decisions in order to give the District Court guidance under those decisions which the Court below apparently did not follow.

CONCLUSION

For the above and foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the Court below vacated and the judgment of the District Court reinstated. In the alternative, this petition for certiorari should be granted and the opinion and judgment of the Court below should be reviewed by this Court for the purpose of bringing it in line with recent decisions of this Court, or, at the very least, clarifying such opinion and judgment with respect to the responsibilities and limitations as to remedies established by this Court's recent decisions, for the benefit of the District Court on remand.

Respectfully submitted,

JOHN F. WARD, JR.
1111 South Foster Drive, Suite C
Post Office Box 65236
Baton Rouge, Louisiana 70896
(504) 923-3462
ATTORNEY FOR
PETITIONERS

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to Robert C. Williams, 1822 North Acadian Thruway, W., Baton Rouge, Louisiana 70802, and Murphy W. Bell, Post Office Box 319, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this day of August, 1978.

JOHN F. WARD, JR.

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR., A MINOR, BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ETC., ET AL

VERSUS — CIVIL ACTION

EAST BATON ROUGE PARISH SCHOOL BOARD, a Corporation, and LLOYD FUNCHESS, as Superintendent of Public Schools in East Baton Rouge Parish — NUMBER 1662

* * * * *

Robert C. Williams, Esq.
WILLIAMS & EAMES
1822 North Acadian Thruway West
Baton Rouge, Louisiana 70802

Murphy W. Bell, Esq.
Post Office Box 319
Baton Rouge, Louisiana 70821

Attorneys for Plaintiffs-Intervenors

John F. Ward, Jr., Esq.
770 North Street
Baton Rouge, Louisiana 70802

Attorney for East Baton Rouge Parish School Board

E. GORDON WEST, District Judge:

This suit, seeking to desegregate the East Baton Rouge Parish school system, was originally filed on February 29, 1956, almost 20 years ago. Over the years, many hearings have been held and many orders have

been issued by this Court in an effort to bring the operation of this school system within the requirements of the United States Constitution as it understood those requirements to be.

The East Baton Rouge Parish School Board has, in each instance, been totally cooperative and has at all times made a good faith effort to comply with the orders issued. Indeed, it has in fact always complied with the orders of this Court. Today, no student in the East Baton Rouge Parish school system is denied either the right or the opportunity to attend an integrated school. In accordance with sound educational principles, the neighborhood school system has, as much as possible, been preserved. This Court, in all of its hearings in connection with the operation of nine separate public school systems, including the East Baton Rouge Parish system, has never heard a single qualified educator state that the neighborhood concept for school attendance is not a sound educational concept. Indeed, the almost unanimous opinion of those who have testified before this Court is that if we are truly interested in the educational welfare of the children involved, the neighborhood concept, at least as far as initial assignment is concerned, should be preserved at all cost. The East Baton Rouge Parish School Board has consistently endeavored to preserve and apply this concept in assigning students to the many schools in its system. Because of purely voluntary housing patterns throughout the Parish of East Baton Rouge, this has, of course, resulted in some schools having an initial assignment of all black students and some having an initial assignment of all white students. Out of the total of 108 schools in the system, 20

are all black and 2 are all white. All other schools have racially mixed student bodies to varying degrees.

It seems to have become a custom for some lawyers to file a motion in this case each year before school starts seeking what they broadly refer to as "Supplemental Relief." It is such a motion that is presently before the Court.

After this rather vague motion was filed, conferences were held with counsel for all parties present. All aspects of the East Baton Rouge Parish school operations were discussed, and the Court tried diligently to ascertain exactly what the attorney who filed the motion was seeking. The only concrete thing that emerged from these conferences as far as the Court could determine was that there were really no "plaintiffs" involved; that the attorney was appearing as an "intervenor"; that no parents of children in the system were appearing to voice any complaints; and that the only thing sought by the attorney-intervenor was "more integration." The Court was unable to elicit any constructive suggestions from the attorney-intervenor, and it was obvious that the requested "more integration" was being sought solely for sociological reasons rather than for the purpose of improved educational opportunity for children. On the basis of these conferences, the Court would have been justified in simply denying the motion for "supplemental relief." However, out of an abundance of caution, and in an effort to obtain the opinion of experts completely detached from the East Baton Rouge Parish school system, the Court appointed the Louisiana Educational Laboratory (LEL) to act as a court-appointed expert to investigate the entire operation of the East Baton Rouge

Parish school system and to advise and assist the Court in determining what action, if any, was needed to bring the East Baton Rouge Parish school system into compliance with the prior desegregation orders of this Court and with present constitutional requirements. At a cost of $27,949.89, borne by the East Baton Rouge Parish School Board, the LEL made an intensive study of the entire school system and filed two comprehensive reports with the Court, a preliminary report dated December 23, 1974, and a final report dated May 1, 1975. These reports have been made a part of the record.

Following receipt of the first report, and after conferences with counsel, the Court issued an order dated February 26, 1975, whereby it ordered certain recommendations of the LEL implemented. These recommendations related to the appointment of blacks to the School Board staff at the decision making and planning levels; further implementation of majority to minority transfer provisions including provisions for furnishing transportation to transferees; re-constituting the Bi-Racial Committee; re-examination of distribution of teachers on basis of race and experience; and re-examination of attendance zones. Evidence since that time has shown that this order has been fully complied with.

Following receipt and distribution of the final report of May 1, 1975, an evidentiary hearing was held. At that hearing the only witnesses called by the "attorney-intervenor" were Dr. Lionel O. Pellegrin, the LEL staff member who authored the reports; Dr. John Moland, Jr., a teacher and researcher at Southern University; and Mr. Ed Steimel, of the Public Affairs Research

Council (PAR). No plaintiffs were called, and no complainants were presented in court.

The sum total of the evidence adduced from these witnesses was (1) students in the Baton Rouge school system are not being denied access to any public school because of race; (2) all students in the East Baton Rouge Parish school system are being offered equal and high quality education; and (3) further forced mixing of the races in the various schools would not in any way improve the quality of education being offered students in the East Baton Rouge Parish schools.

This, in essence, was the testimony offered by the "attorney-intervenor" in support of his request for "supplemental relief." All witnesses testified that as a general rule, assignment on the neighborhood school basis produces the best educational opportunity because it produces greater interplay between students, parents, and teachers, and it creates more stability in the school system. Dr. Moland stated that in his opinion, while the neighborhood concept does not always enhance desegregation because of the fact that white students tend to move out when the ratio of blacks to whites becomes too large, placing a few white students in a predominantly black school does not improve the educational quality of the school. He concluded that such a move is purely sociological and does not necessarily enhance the educational opportunity available to students. This was one of the plaintiff's witnesses. Mr. Ed Steimel, the only other witness called by the intervenor, based his testimony primarily on the recent report of Dr. James S. Coleman, the University of Chicago sociologist who originally supported the concept of massive bussing to achieve forced

racial balance in public schools. But he, in his most recent report, concludes that "You can't create integration by court edict" alone. Based largely on Dr. Coleman's report, Mr. Steimel concluded that it is far better from an educational standpoint to keep schools either all black, or with a majority of white students. He concluded that experience has shown that black students learn better when their school is all black than they do where there is only a token number of whites mixed in. This was the testimony of another one of plaintiff's witnesses. This observation, allegedly supported by Dr. Coleman's report, is important when considering the validity of attendance zones established by the School Board. The evidence in this case makes it abundantly clear that there is no forced segregation of the races in the East Baton Rouge Parish school system, and that every student has the opportunity to attend an integrated school, with transportation furnished, if he wishes to do so. Whatever segregation exists, as it does in a few all black and all white schools in the system, exists by deliberate choice and because of legitimate, voluntary neighborhood patterns. To force a few white students to attend a few all black schools, or to force a few black students to attend the two all white schools, solely for the purpose of being able to say that 100 per cent of the schools in the system have racially mixed student bodies would be the height of foolishness. If there was any credible evidence to suggest that the students involved in a presently all black or all white school would be afforded better educational opportunity by sending a few students of the opposite race there, a valid argument might be made for doing so. But experience,

as well as the evidence in this case, has shown the opposite to be true. It must be remembered that the true objective in this whole school integration turmoil was supposed to be to improve the quality of education available to all students. The objective was never intended to be to reduce educational opportunity to the lowest common denominator, nor to play a "constitutional numbers game" with a view to being able to merely say that certain pre-determined ratios of mixing have been achieved, across the board, in all schools, without regard to its effect on the quality of education being offered the students involved. It is imperative that we immediately turn away from the absurd course that some would have us follow whereby court decrees are sought and used in school desegregation cases for the sole purpose of bringing about some sought after sociological change rather than for the purpose of securing to all students, regardless of race, their constitutional right to equal educational opportunity.

The Federal Courts have demonstrated their ability and their determination to see that constitutional rights, as they pertain to equal educational opportunity for all students, are protected. This they should, of course, do. But the Courts should be equally determined to see that they are not used, or mis-used, for the purpose of bringing about purely sociological changes that do not fall within the limited jurisdiction granted to the Federal Courts by the Congress and by the Constitution.

Public Law 93-380, known as the Equal Educational Opportunities Act of 1974, became effective on August 21, 1974. Title II of this Act, (hereafter "the Act"), deals with the Equal Educational Opportunities of Students.

See 20 U.S.C.A. §1701-1720, 1751, 1752-1758. Section 202 of the Act re-establishes the policy that all children are entitled to equal educational opportunity, and that the neighborhood is the appropriate basis for public school assignment. Section 205 indicates that lack of balance on the basis of race is not necessarily a denial of equal educational opportunity. Section 206 states that assignment of students on a neighborhood basis is not a denial of equal educational opportunity unless such assignment is for the purpose of segregation or unless the school was purposely located on the site for the purpose of segregation. Such is not the case in the East Baton Rouge Parish system. Section 208 provides that once a school system is determined by the Court to be desegregated, or unitary, school population changes shall not per se constitute a cause for a new plan of desegregation. The evidence in this case shows conclusively that the East Baton Rouge Parish school system has been desegregated, and is a unitary system, and there is no evidence to justify the ordering of a new plan of desegregation. Section 213 calls for imposition of only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws. Neither the LEL, in its intensive and extensive investigation, nor this Court finds any evidence of denial of equal educational opportunity or equal protection of the laws in the East Baton Rouge Parish school system. The attorney-intervenor in this case would have the Court order massive bussing for the sole purpose of achieving a greater percentage of racial mixing in each school. The mere suggestion of this is preposterous and any such order would be clearly illegal. Section 214 of

the Act establishes a priority of remedies, if indeed remedies were found necessary. Included in these remedies is the assignment of students to the closest school, permitting majority to minority transfers, creation of attendance zones that will not require transportation, and establishment of magnet schools. All of these things are either being done, or are currently under study by the East Baton Rouge Parish school system. But further than this, the Act specifically provides that the provisions of Section 214 are subject to the provisions of Section 215 which specifically limits transportation of students to schools closest or next closest to the place of residence of the student. Then, to emphasize the intent of Congress, the Act, in Section 251 specifically states that the Act shall not be interpreted to require the use of transportation of students to overcome a racial imbalance. These are among the pertinent provisions of the Equal Educational Opportunities Act of 1974. While the Act provides in Section 203 (b) that the provisions of the Act are not intended to modify the authority of a court to fully enforce the Fifth and Fourteenth Amendments, this provision is no license for the Federal Courts to ignore or thwart the clear intent of Congress. The enumeration by Congress of the things that should not be done for the purpose of achieving some predetermined degree of racial mixing in schools is an unambiguous indication of the intent of Congress. The Courts should be bound by those proscriptions, and it should be only in cases where lack of integration in a particular school is the result of some positive act on the part of the state, the municipality, or the school authorities to further segregation that the reference to the Fifth and

Fourteenth Amendments in the Act becomes important. There is no evidence in this case of Fifth or Fourteenth Amendment violations.

The evidence and the record in this case show without question of doubt that the East Baton Rouge Parish school system is indeed a unitary, desegregated school system and that it is being operated in compliance with the Constitution and laws of the United States. It is being operated in complete accord with the Equal Educational Opportunities Act of 1974, supra, and there is not the slightest indication present of any violation of the prior orders of this Court.

The final report of the LEL contained several suggestions and recommendations pertaining to the future operation of the schools. While many of these suggestions obviously have merit and should be seriously considered by the School Board, they are, nevertheless, not changes that are required by law or by court order. Several of the recommended changes have been implemented, for which the School Board should be commended. They have added two black administrators at policy making level to the staff. The suggested extension of the majority to minority transfer provision has been widely publicized and implemented. Not only has transportation been provided for those requesting transfer, but transportation is provided for students who wish to take a look at another school in which he might be interested. Applications for transfer are being encouraged. A new Bi-Racial Committee has been organized and meets on a regular basis. This Committee has under active consideration such items as teacher assignment, attendance zones, consolidation of schools, and estab-

lishment of magnet schools. Many of the LEL recommendations, such as those pertaining to Staff Organization, Responsibility of the School Board, Staff Responsibility, etc., while undoubtedly having merit, are not matters over which this Court should exercise jurisdiction. However, as the evidence clearly shows, most of those recommendations have either been implemented or are under serious consideration by the School Board and by the Bi-Racial Committee. As to the specific recommendations made by LEL pertaining to attendance zone changes, the Court concludes that these recommended changes are not required in order to bring the system into compliance with either the law or prior orders of this Court. While some of the recommendations may have merit, the question of whether or not they are to be followed by the School Board is entirely a matter of school administration, and not a matter to be decided by the Court. Most, if not all, of the recommended changes in attendance zones would have only a minimal effect on the degree of integration of student bodies. None of the recommended changes are required either by law or by prior order of the Court, and there is no evidence to suggest that the recommended changes in attendance zones would substantially affect the quality of education being offered the students in the system. While good school administration would suggest a constant review of such things as transportation routes, school attendance zones, etc., this Court concludes that in view of the record in this case, no mandatory changes in attendance zones is indicated. This Court further finds, as a fact, that the East Baton Rouge Parish school system is a unitary system being operated on a non-discriminatory

basis, in accordance with the requirements of law and the prior orders of the Court.

This case has now been under the continuing jurisdiction of this Court for close to 20 years. The retention of such jurisdiction was mandated by the Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 75 S.Ct. 753, 756. The Court said that the District Courts should supervise the transition of school systems from segregated to unitary systems, and that "*During this period of transition* the Courts will retain jurisdiction of these cases." (Emphasis added.) This mandate, by clear implication, requires that at the end of the period of transition, or when the school system has been declared to be a unitary system, the jurisdiction of the Court over that particular case should come to an end. There is good reason for this as the present case clearly shows. The transition has been completed. There are no longer any plaintiffs in this suit. Retention of jurisdiction perpetuates an intolerable "motion practice" in these school cases which denies the school boards the fundamental right to be sued only by a plaintiff who must carry the burden of proving his case. This "motion practice" that has developed and has been perpetuated in these desegregation cases enables people, such as the attorney-intervenor in this case, to simply file a motion, obtain a show cause order, and this shift the burden of proof to the School Board. This procedure had its place during the early stages of the desegregation process. But after the school system has been declared to be a unitary system, operating in accordance with law and constitutional principles, the transition is complete even though further improvements may be made or future violations

may occur. After 20 years, this school system has been and is now declared to be a unitary system. The time has come to say that if future causes of action arise in connection with the administration of the East Baton Rouge Parish school system, the complainant must follow the long established principles of our law and file his suit as in any other civil proceeding, permit the defendant to answer the suit, and then proceed, if he can, to carry the burden of proving his case by a preponderance of the evidence. The dual standard that has been established in these school cases should be terminated as soon as the school board has been found to be operating the school system in accordance with law. The constant harassment of school boards by those who are permitted to engage in this unjustified "motion practice" is costly to the school system, costly to the people of the community, and detrimental to the operation of the schools. We must return to the long accepted principle that he who asserts the affirmative of an issue in a civil case must carry the burden of proving it by a preponderance of the evidence. The school board, after having been found to have converted its system to a unitary system, should no longer be presumed to be guilty and thus required to prove its innocence. The East Baton Rouge Parish school system is a unitary system, and there are simply no justiciable issues left in this particular case. If new causes of action arise, they must be the subject of new suits.

Therefore, for these reasons, the demands of the "plaintiff-intervenor" for "supplemental relief" will be denied, and this suit will be dismissed and closed. Judgment will be entered accordingly.

Baton Rouge, Louisiana, August 21, 1975.

/s/ E. GORDON WEST

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR.,
A MINOR, BY HIS FATHER AND NEXT
FRIEND, CLIFFORD EUGENE
DAVIS, SR., ETC., ET AL

VERSUS

CIVIL ACTION
NUMBER 1662

EAST BATON ROUGE PARISH SCHOOL
BOARD, a Corporation, and LLOYD
FUNCHESS, as Superintendent of Public
Schools in East Baton Rouge Parish

JUDGMENT

This matter came on for hearing on a former day on motion of plaintiff-intervenor for supplemental relief. After due consideration of the evidence heard and the record made in this case, for the written reasons this day assigned:

IT IS ORDERED that the motion of plaintiff-intervenor for supplemental relief be, and it is hereby DENIED, and this entire suit is now DISMISSED.

Baton Rouge, Louisiana, August 21, 1975.

/s/ E. GORDON WEST

UNITED STATES DISTRICT JUDGE

APPENDIX B

Clifford Eugene DAVIS, Jr., et al., Plaintiffs,

Dr. D'Orsay Bryant and Alphonso O. Potter,
Plaintiffs-Intervenors-Appellants,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD et al.,
Defendants-Appellees.

No. 75-3610.

United States Court of Appeals, Fifth Circuit.

April 7, 1978.

Intervenors in school desegregation case filed motion for supplemental relief, seeking further integration of East Baton Rouge Parish school. The United States District Court for the Middle District of Louisiana, 398 F.Supp. 1013, E. Gordon West, J., dismissed case with prejudice, and intervenors appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) where district court failed to determine whether eradication of vestiges of past discrimination evidenced by one-race schools could be accomplished by remedial alternative desegregation methods, case would be remanded for such determination, and (2) where teacher reassignment plan, although facially neutral, led to placement of less experienced teachers in "black" schools and more experienced teachers in "white" schools, case would be remanded for making of specific findings concerning such plan, and (3) district court would be directed to consider and make findings on other issues raised by intervenors' motion for supplemental relief.

Vacated and remanded with instructions.

1. Schools and School Districts ⇐13(21)

Where over half of schools in school district had student bodies that were 90% or more of one race, where over half of black students attended schools that were substantially all black, and where district court commended neighborhood school plan utilized by school board without determining whether further eradication of vestiges of past discrimination evidenced by one-race schools could be accomplished by means of desegregation tools such as remedial altering of attendance zones or pairing and clustering of noncontiguous school zones, school desegregation case would be remanded for consideration of possible alternatives to neighborhood school concepts and for making of findings regarding feasibility and efficacy of implementing one or combination of such alternatives.

2. Federal Courts ⇐841

Findings and conclusions Court of Appeals reviews must be expressed with sufficient particularity to allow Court of Appeals to determine rather than speculate that law has been correctly applied.

3. Schools and School Districts ⇐141(5)

Where teacher reassignment plan designed to remedy disproportionate racial balance of teachers in schools, while facially neutral, led to placement of less experienced teachers in "black" schools and more experienced, and therefore allegedly more qualified, teachers in "white" schools, district court would be directed to consider plan in light of dual purposes of effecting desegregation and promoting quality education.

4. Schools and School Districts ⇐13(21)

In school desegregation case, district court would be directed on remand to consider and make findings on issues raised by intervenors' motion for supplemental relief, including issues concerning alleged discrimination in new school construction and site selection, planning of schools, and use of biracial committee.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1978, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, TJOFLAT, and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

In the proceedings below, the district court found that the East Baton Rouge Parish school system is a unitary system being operated on a nondiscriminatory basis and dismissed this case with prejudice. The intervenors appeal from the district court's order; they claim that the school system is not and never has been unitary.[1]

Like so many school desegregation suits in this circuit, this case has been in the federal courts for many years. The suit was instituted in 1956, following the Supreme Court's decisions in *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the course of this protracted litigation, the district court has entered various injunctive orders, keeping pace with the evolving law in this area as espoused by the Supreme Court and this circuit.[2]

The East Baton Rouge Parish school system was last before this court in a consolidated case decided in 1967. *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) (en banc), *modifying*, 372 F.2d 836 (1966). This court remanded the case to the district court in 1967, with instructions that the district court enforce the affirmative duty of the

> boards and officials administering public schools . . . to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. . . . The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students.

Id. at 389 (footnotes omitted). Following this court's remand, East Baton Rouge Parish operated a combined geographic zone and freedom-of-choice school assignment plan. *Davis v. East Baton Rouge Parish School Board*, 269 F.Supp. 60 (M.D.La.1967). Two years later, this court held in *Hall v. St. Helena Parish School Board*, 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904, 90 S.Ct. 218, 24 L.Ed.2d 180 (1969), that a freedom of the East Baton Rouge Parish schools by filing a motion for supplemental relief. The district court's opinion denying this motion and dismissing the entire suit is reported at 398 F.Supp. 1013 (M.D.La.1975).

1. Dr. D'Orsay Bryant and Mr. Alphonso O. Potter were allowed to intervene as plaintiffs by the district court on December 19, 1969. Dr. Bryant, President of the Baton Rouge Chapter of the NAACP, and Mr. Potter, Regional Vice-President of the NAACP for the Sixth District, were both black citizens of the Parish and fathers of school-age children. In their motion to intervene, they alleged that the interests of local black children were not being properly and expeditiously represented. In 1974, the intervenors sought further integra-

2. In addition to the order of dismissal now on appeal, see note 1 *supra*, there have been three other reported decisions by the district court. These decisions can be found at 269 F.Supp. 60 (M.D.La.1967), 219 F.Supp. 876 (M.D.La. 1963), and 214 F.Supp. 624 (M.D.La.1963).

dom of choice plan was unacceptable when it did not effectively desegregate the school system. Following the *Hall* decision, in 1970 the East Baton Rouge Parish School Board established a biracial committee, the Public Education Study Committee, which created two biracial subcommittees to consider separately the problems of student and faculty desegregation. The biracial committee formulated a proposed school desegregation plan that was unanimously approved by the school board and submitted to the district court, which adopted it on July 22, 1970. Second supp. record at 30. No appeal was taken.

The 1970 plan provided for desegregation of faculty, staff, transportation, extracurricular activities, student body composition, and school facilities. Student assignment was based primarily on the neighborhood school concept, under which children would attend the school closest to their place of residence. A majority-to-minority transfer provision was also incorporated into the plan, allowing a child attending a school in which the majority of students were of his race to transfer to a school in which he would be in the minority.

In 1974, the intervenors filed a motion for further relief. Drawn in general terms, the motion alleged that the 1970 plan was not desegregating the school system effectively. This contention was based primarily on two grounds. First, in East Baton Rouge Parish there still exist many one-race or substantially one-race schools. Second, the present teacher reassignment plan, although desegregating the faculty, places less experienced teachers in the "black" schools, thereby allegedly lowering the quality of education.

On August 14, 1974, the district judge designated the Louisiana Educational Laboratory (LEL) as a court-appointed expert to assist the court in the case and directed LEL to file an interim report by January 1, 1975, indicating any immediate remedies that the court should impose. Based upon the recommendations made by LEL, the district court entered an interim order on February 26, 1975.[3] After the LEL filed its final report, the district court set a final hearing on the intervenors' motion for supplemental relief and challenge to the LEL study. This hearing was held on June 18, 1975. Four witnesses testified: the LEL officer who supervised the study, the school board superintendent, and two witnesses not directly involved in either the LEL study or the administration of the school system. At the conclusion of the hearing, the district judge requested briefing from the parties.

On August 21, 1975, the district court handed down the order that is the basis of this appeal. 398 F.Supp. 1013 (M.D. La.1975). The district judge stated that the interim relief ordered in February had been fully complied with, that the biracial committee was in the process of studying further desegregation techniques (*e. g.*, alteration of attendance zones, reassignment of teachers, and clustering of schools), and that the school board had already done everything that the Constitution mandates in eliminating a dual school system. He declared the system to be unitary and held that under *Brown II*'s mandate that the federal courts retain jurisdiction over a school system pending its transition from a dual to a unitary system, the East Baton Rouge Parish school system was no longer appropriately within his jurisdiction. Accordingly, he dismissed the suit with prejudice.

3. The district judge found that the school board had made "a good faith effort to comply with the prior orders of this Court, and to bring this school system into compliance with the Court's orders and with constitutional requirements." Record, vol. I, at 110. Despite this finding, the judge ordered immediate school board action on several of the LEL recommendations: (1) the appointment of a second black to a high administrative position; (2) the provision of public transportation to complement the majority-to-minority transfer option; (3) the reorganization of the biracial committee, rendering it a court-appointed advisory body; and (4) the consideration of further planning in the areas of the magnet school concept, the restructuring of attendance zones, and the racial composition of the school board's central staff.

I. Student Assignment

The main thrust of the intervenors' attack on East Baton Rouge Parish's school desegregation is the large number of substantially one-race schools. The record discloses that East Baton Rouge Parish School System serves both the city of Baton Rouge and the parish of East Baton Rouge. The parish contains 468.35 square miles, is irregularly shaped, and is approximately thirty miles from north to south and twenty miles from east to west. Along with the city of Baton rouge, there are suburban and rural areas in the parish. There are approximately 70,000 students enrolled in the school system, of which some 36,000 are transported daily by provision of the school board. The racial mix is approximately sixty-five percent white, thirty-five percent black.

Of the approximately 110 schools in the system, twenty have student bodies comprised solely of black children. In addition, over half of the schools have student bodies that are ninety percent or more of one race, and over half of the black students attend schools that are substantially all black.

In its order dismissing the case, the court below commended the neighborhood school plan now utilized by the school board without determining whether further eradication of the vestiges of past discrimination, which are evidenced by the one-race schools, could be accomplished by means of the "desegregation tools" approved in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). *See also, Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *United States v. Mississippi*, 567 F.2d 1276 (5th Cir. 1978).

There is a presumption under *Swann* against the maintenance of a school system with substantially one-race schools. The Supreme Court declared as follows:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

402 U.S. at 26, 91 S.Ct. at 1281. In the absence of explicit and specific findings by the district court, we are unable to determine whether the school board has met its burden and whether these schools have been subjected to the close scrutiny that is required prior to declaring that a school system passes constitutional muster. We therefore vacate the district court's order dismissing the case and remand the case for further proceedings. *See, e. g., United States v. South Park Independent School District*, 566 F.2d 1221 (5th Cir. 1978).

[1, 2] At a minimum, the district court on remand must evaluate whether any of the essentially one-race schools would be eliminated by the remedial al-

tering of attendance zones or the pairing and clustering of noncontiguous school zones. *See Swann*, 402 U.S. at 27-29 & n. 10, 91 S.Ct. at 1281-82; *Lemon v. Bossier Parish School Board*, 566 F.2d 985 (5th Cir. 1978); *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142, 152-54 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044 (1973). These are only examples of the permissible tools that may be used to integrate a school system. The district court is directed to consider the possible alternatives to the neighborhood school concept and to make findings regarding the feasibility and efficacy of implementing one or a combination of these alternatives. As this court has repeatedly stated, "The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir. 1977) (quoting *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975)).

II

[3] The second point raised by the intervenors concerns the present teacher reassignment plan, implemented pursuant to *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir.), *ref'd in part on other grounds sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970). The plan was designed to remedy the disproportionate racial balance of teachers in the schools. Although facially neutral, the plan has led to the placement of inexperienced teachers in the "black" schools and more experienced, and therefore allegedly more qualified, teachers in the "white" schools. This occurred because transfers were made in reverse order of seniority; the teacher in a particular school with the most seniority, whether white or black, is the last teacher to be transferred to another school. Two of the factors contributing to this imbalance in experience are the larger number of white teachers and the longer duration of black teachers in the school system. These factors create a larger pool of relatively inexperienced white teachers so that when they are "traded" for black teachers, the school system places a disproportionate number of relatively inexperienced teachers into the "black" schools.

We reserve any decision on the teacher reassignment scheme utilized by the East Baton Rouge Parish school board. As stated previously, the biracial committee has been studying the present plan. The district court on remand is directed to consider the plan in light of the dual purposes involved: desegregation must be effected, and quality education must be promoted. Specific findings must be made by the district court on this aspect of the desegregation of the school system so that we can properly review the issue. *See Golf City, Inc. v. Wilson Sporting Goods, Inc.*

III

[4] As part of its inquiry on remand, the district court is directed to consider and to make findings on the other issues raised by the intervenors' motion for supplemental relief. These issues concern alleged discrimination in new school construction and site selection, funding of schools, and use of the biracial committee.

The judgment dismissing the case is vacated. The case is remanded for further proceedings and specific findings in accordance with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Supreme Court, U. S.
FILED
SEP 7 1978
MICHAEL RODAK, JR., CLERK

No. 78-302

In the Supreme Court of the United States

OCTOBER TERM, 1978

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHN F. WARD, JR.
1111 South Foster Drive, Suite C
Post Office Box 65236
Baton Rouge, Louisiana 70896
(504) 923-3462

ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS

PAGE

Appendix A: District Court Opinion and Judgment . 1
Appendix B: Court of Appeals Decision 15
Appendix C: Court of Appeals Denial of Rehearing 25
Certificate 26

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR., A MINOR, BY HIS FATHER AND NEXT FRIEND, CLIFFORD EUGENE DAVIS, SR., ETC., ET AL

VERSUS — CIVIL ACTION

EAST BATON ROUGE PARISH SCHOOL BOARD, a Corporation, and LLOYD FUNCHESS, as Superintendent of Public Schools in East Baton Rouge Parish — NUMBER 1662

* * * * *

Robert C. Williams, Esq.
WILLIAMS & EAMES
1822 North Acadian Thruway West
Baton Rouge, Louisiana 70802

Murphy W. Bell, Esq.
Post Office Box 319
Baton Rouge, Louisiana 70821

Attorneys for Plaintiffs-Intervenors

John F. Ward, Jr., Esq.
770 North Street
Baton Rouge, Louisiana 70802

Attorney for East Baton Rouge Parish School Board

E. GORDON WEST, District Judge:

This suit, seeking to desegregate the East Baton Rouge Parish school system, was originally filed on February 29, 1956, almost 20 years ago. Over the years, many hearings have been held and many orders have

been issued by this Court in an effort to bring the operation of this school system within the requirements of the United States Constitution as it understood those requirements to be.

The East Baton Rouge Parish School Board has, in each instance, been totally cooperative and has at all times made a good faith effort to comply with the orders issued. Indeed, it has in fact always complied with the orders of this Court. Today, no student in the East Baton Rouge Parish school system is denied either the right or the opportunity to attend an integrated school. In accordance with sound educational principles, the neighborhood school system has, as much as possible, been preserved. This Court, in all of its hearings in connection with the operation of nine separate public school systems, including the East Baton Rouge Parish system, has never heard a single qualified educator state that the neighborhood concept for school attendance is not a sound educational concept. Indeed, the almost unanimous opinion of those who have testified before this Court is that if we are truly interested in the educational welfare of the children involved, the neighborhood concept, at least as far as initial assignment is concerned, should be preserved at all cost. The East Baton Rouge Parish School Board has consistently endeavored to preserve and apply this concept in assigning students to the many schools in its system. Because of purely voluntary housing patterns throughout the Parish of East Baton Rouge, this has, of course, resulted in some schools having an initial assignment of all black students and some having an initial assignment of all white students. Out of the total of 108 schools in the system, 20

are all black and 2 are all white. All other schools have racially mixed student bodies to varying degrees.

It seems to have become a custom for some lawyers to file a motion in this case each year before school starts seeking what they broadly refer to as "Supplemental Relief." It is such a motion that is presently before the Court.

After this rather vague motion was filed, conferences were held with counsel for all parties present. All aspects of the East Baton Rouge Parish school operations were discussed, and the Court tried diligently to ascertain exactly what the attorney who filed the motion was seeking. The only concrete thing that emerged from these conferences as far as the Court could determine was that there were really no "plaintiffs" involved; that the attorney was appearing as an "intervenor"; that no parents of children in the system were appearing to voice any complaints; and that the only thing sought by the attorney-intervenor was "more integration." The Court was unable to elicit any constructive suggestions from the attorney-intervenor, and it was obvious that the requested "more integration" was being sought solely for sociological reasons rather than for the purpose of improved educational opportunity for children. On the basis of these conferences, the Court would have been justified in simply denying the motion for "supplemental relief." However, out of an abundance of caution, and in an effort to obtain the opinion of experts completely detached from the East Baton Rouge Parish school system, the Court appointed the Louisiana Educational Laboratory (LEL) to act as a court-appointed expert to investigate the entire operation of the East Baton Rouge

Parish school system and to advise and assist the Court in determining what action, if any, was needed to bring the East Baton Rouge Parish school system into compliance with the prior desegregation orders of this Court and with present constitutional requirements. At a cost of $27,949.89, borne by the East Baton Rouge Parish School Board, the LEL made an intensive study of the entire school system and filed two comprehensive reports with the Court, a preliminary report dated December 23, 1974, and a final report dated May 1, 1975. These reports have been made a part of the record.

Following receipt of the first report, and after conferences with counsel, the Court issued an order dated February 26, 1975, whereby it ordered certain recommendations of the LEL implemented. These recommendations related to the appointment of blacks to the School Board staff at the decision making and planning levels; further implementation of majority to minority transfer provisions including provisions for furnishing transportation to transferees; re-constituting the Bi-Racial Committee; re-examination of distribution of teachers on basis of race and experience; and re-examination of attendance zones. Evidence since that time has shown that this order has been fully complied with.

Following receipt and distribution of the final report of May 1, 1975, an evidentiary hearing was held. At that hearing the only witnesses called by the "attorney-intervenor" were Dr. Lionel O. Pellegrin, the LEL staff member who authored the reports; Dr. John Moland, Jr., a teacher and researcher at Southern University; and Mr. Ed Steimel, of the Public Affairs Research

Council (PAR). No plaintiffs were called, and no complainants were presented in court.

The sum total of the evidence adduced from these witnesses was (1) students in the Baton Rouge school system are not being denied access to any public school because of race; (2) all students in the East Baton Rouge Parish school system are being offered equal and high quality education; and (3) further forced mixing of the races in the various schools would not in any way improve the quality of education being offered students in the East Baton Rouge Parish schools.

This, in essence, was the testimony offered by the "attorney-intervenor" in support of his request for "supplemental relief." All witnesses testified that as a general rule, assignment on the neighborhood school basis produces the best educational opportunity because it produces greater interplay between students, parents, and teachers, and it creates more stability in the school system. Dr. Moland stated that in his opinion, while the neighborhood concept does not always enhance desegregation because of the fact that white students tend to move out when the ratio of blacks to whites becomes too large, placing a few white students in a predominantly black school does not improve the educational quality of the school. He concluded that such a move is purely sociological and does not necessarily enhance the educational opportunity available to students. This was one of the plaintiff's witnesses. Mr. Ed Steimel, the only other witness called by the intervenor, based his testimony primarily on the recent report of Dr. James S. Coleman, the University of Chicago sociologist who originally supported the concept of massive bussing to achieve forced

racial balance in public schools. But he, in his most recent report, concludes that "You can't create integration by court edict" alone. Based largely on Dr. Coleman's report, Mr. Steimel concluded that it is far better from an educational standpoint to keep schools either all black, or with a majority of white students. He concluded that experience has shown that black students learn better when their school is all black than they do where there is only a token number of whites mixed in. This was the testimony of another one of plaintiff's witnesses. This observation, allegedly supported by Dr. Coleman's report, is important when considering the validity of attendance zones established by the School Board. The evidence in this case makes it abundantly clear that there is no forced segregation of the races in the East Baton Rouge Parish school system, and that every student has the opportunity to attend an integrated school, with transportation furnished, if he wishes to do so. Whatever segregation exists, as it does in a few all black and all white schools in the system, exists by deliberate choice and because of legitimate, voluntary neighborhood patterns. To force a few white students to attend a few all black schools, or to force a few black students to attend the two all white schools, solely for the purpose of being able to say that 100 per cent of the schools in the system have racially mixed student bodies would be the height of foolishness. If there was any credible evidence to suggest that the students involved in a presently all black or all white school would be afforded better educational opportunity by sending a few students of the opposite race there, a valid argument might be made for doing so. But experience,

as well as the evidence in this case, has shown the opposite to be true. It must be remembered that the true objective in this whole school integration turmoil was supposed to be to improve the quality of education available to all students. The objective was never intended to be to reduce educational opportunity to the lowest common denominator, nor to play a "constitutional numbers game" with a view to being able to merely say that certain pre-determined ratios of mixing have been achieved, across the board, in all schools, without regard to its effect on the quality of education being offered the students involved. It is imperative that we immediately turn away from the absurd course that some would have us follow whereby court decrees are sought and used in school desegregation cases for the sole purpose of bringing about some sought after sociological change rather than for the purpose of securing to all students, regardless of race, their constitutional right to equal educational opportunity.

The Federal Courts have demonstrated their ability and their determination to see that constitutional rights, as they pertain to equal educational opportunity for all students, are protected. This they should, of course, do. But the Courts should be equally determined to see that they are not used, or mis-used, for the purpose of bringing about purely sociological changes that do not fall within the limited jurisdiction granted to the Federal Courts by the Congress and by the Constitution.

Public Law 93-380, known as the Equal Educational Opportunities Act of 1974, became effective on August 21, 1974. Title II of this Act, (hereafter "the Act"), deals with the Equal Educational Opportunities of Students.

See 20 U.S.C.A. §1701-1720, 1751, 1752-1758. Section 202 of the Act re-establishes the policy that all children are entitled to equal educational opportunity, and that the neighborhood is the appropriate basis for public school assignment. Section 205 indicates that lack of balance on the basis of race is not necessarily a denial of equal educational opportunity. Section 206 states that assignment of students on a neighborhood basis is not a denial of equal educational opportunity unless such assignment is for the purpose of segregation or unless the school was purposely located on the site for the purpose of segregation. Such is not the case in the East Baton Rouge Parish system. Section 208 provides that once a school system is determined by the Court to be desegregated, or unitary, school population changes shall not per se constitute a cause for a new plan of desegregation. The evidence in this case shows conclusively that the East Baton Rouge Parish school system has been desegregated, and is a unitary system, and there is no evidence to justify the ordering of a new plan of desegregation. Section 213 calls for imposition of only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws. Neither the LEL, in its intensive and extensive investigation, nor this Court finds any evidence of denial of equal educational opportunity or equal protection of the laws in the East Baton Rouge Parish school system. The attorney-intervenor in this case would have the Court order massive bussing for the sole purpose of achieving a greater percentage of racial mixing in each school. The mere suggestion of this is preposterous and any such order would be clearly illegal. Section 214 of

the Act establishes a priority of remedies, if indeed remedies were found necessary. Included in these remedies is the assignment of students to the closest school, permitting majority to minority transfers, creation of attendance zones that will not require transportation, and establishment of magnet schools. All of these things are either being done, or are currently under study by the East Baton Rouge Parish school system. But further than this, the Act specifically provides that the provisions of Section 214 are subject to the provisions of Section 215 which specifically limits transportation of students to schools closest or next closest to the place of residence of the student. Then, to emphasize the intent of Congress, the Act, in Section 251 specifically states that the Act shall not be interpreted to require the use of transportation of students to overcome a racial imbalance. These are among the pertinent provisions of the Equal Educational Opportunities Act of 1974. While the Act provides in Section 203 (b) that the provisions of the Act are not intended to modify the authority of a court to fully enforce the Fifth and Fourteenth Amendments, this provision is no license for the Federal Courts to ignore or thwart the clear intent of Congress. The enumeration by Congress of the things that should not be done for the purpose of achieving some predetermined degree of racial mixing in schools is an unambiguous indication of the intent of Congress. The Courts should be bound by those proscriptions, and it should be only in cases where lack of integration in a particular school is the result of some positive act on the part of the state, the municipality, or the school authorities to further segregation that the reference to the Fifth and

Fourteenth Amendments in the Act becomes important. There is no evidence in this case of Fifth or Fourteenth Amendment violations.

The evidence and the record in this case show without question of doubt that the East Baton Rouge Parish school system is indeed a unitary, desegregated school system and that it is being operated in compliance with the Constitution and laws of the United States. It is being operated in complete accord with the Equal Educational Opportunities Act of 1974, supra, and there is not the slightest indication present of any violation of the prior orders of this Court.

The final report of the LEL contained several suggestions and recommendations pertaining to the future operation of the schools. While many of these suggestions obviously have merit and should be seriously considered by the School Board, they are, nevertheless, not changes that are required by law or by court order. Several of the recommended changes have been implemented, for which the School Board should be commended. They have added two black administrators at policy making level to the staff. The suggested extension of the majority to minority transfer provision has been widely publicized and implemented. Not only has transportation been provided for those requesting transfer, but transportation is provided for students who wish to take a look at another school in which he might be interested. Applications for transfer are being encouraged. A new Bi-Racial Committee has been organized and meets on a regular basis. This Committee has under active consideration such items as teacher assignment, attendance zones, consolidation of schools, and establishment of magnet schools. Many of the LEL recommendations, such as those pertaining to Staff Organization, Responsibility of the School Board, Staff Responsibility, etc., while undoubtedly having merit, are not matters over which this Court should exercise jurisdiction. However, as the evidence clearly shows, most of those recommendations have either been implemented or are under serious consideration by the School Board and by the Bi-Racial Committee. As to the specific recommendations made by LEL pertaining to attendance zone changes, the Court concludes that these recommended changes are not required in order to bring the system into compliance with either the law or prior orders of this Court. While some of the recommendations may have merit, the question of whether or not they are to be followed by the School Board is entirely a matter of school administration, and not a matter to be decided by the Court. Most, if not all, of the recommended changes in attendance zones would have only a minimal effect on the degree of integration of student bodies. None of the recommended changes are required either by law or by prior order of the Court, and there is no evidence to suggest that the recommended changes in attendance zones would substantially affect the quality of education being offered the students in the system. While good school administration would suggest a constant review of such things as transportation routes, school attendance zones, etc., this Court concludes that in view of the record in this case, no mandatory changes in attendance zones is indicated. This Court further finds, as a fact, that the East Baton Rouge Parish school system is a unitary system being operated on a non-discriminatory

basis, in accordance with the requirements of law and the prior orders of the Court.

This case has now been under the continuing jurisdiction of this Court for close to 20 years. The retention of such jurisdiction was mandated by the Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 75 S.Ct. 753, 756. The Court said that the District Courts should supervise the transition of school systems from segregated to unitary systems, and that "*During this period of transition* the Courts will retain jurisdiction of these cases." (Emphasis added.) This mandate, by clear implication, requires that at the end of the period of transition, or when the school system has been declared to be a unitary system, the jurisdiction of the Court over that particular case should come to an end. There is good reason for this as the present case clearly shows. The transition has been completed. There are no longer any plaintiffs in this suit. Retention of jurisdiction perpetuates an intolerable "motion practice" in these school cases which denies the school boards the fundamental right to be sued only by a plaintiff who must carry the burden of proving his case. This "motion practice" that has developed and has been perpetuated in these desegregation cases enables people, such as the attorney-intervenor in this case, to simply file a motion, obtain a show cause order, and this shift the burden of proof to the School Board. This procedure had its place during the early stages of the desegregation process. But after the school system has been declared to be a unitary system, operating in accordance with law and constitutional principles, the transition is complete even though further improvements may be made or future violations

may occur. After 20 years, this school system has been and is now declared to be a unitary system. The time has come to say that if future causes of action arise in connection with the administration of the East Baton Rouge Parish school system, the complainant must follow the long established principles of our law and file his suit as in any other civil proceeding, permit the defendant to answer the suit, and then proceed, if he can, to carry the burden of proving his case by a preponderance of the evidence. The dual standard that has been established in these school cases should be terminated as soon as the school board has been found to be operating the school system in accordance with law. The constant harassment of school boards by those who are permitted to engage in this unjustified "motion practice" is costly to the school system, costly to the people of the community, and detrimental to the operation of the schools. We must return to the long accepted principle that he who asserts the affirmative of an issue in a civil case must carry the burden of proving it by a preponderance of the evidence. The school board, after having been found to have converted its system to a unitary system, should no longer be presumed to be guilty and thus required to prove its innocence. The East Baton Rouge Parish school system is a unitary system, and there are simply no justiciable issues left in this particular case. If new causes of action arise, they must be the subject of new suits.

Therefore, for these reasons, the demands of the "plaintiff-intervenor" for "supplemental relief" will be denied, and this suit will be dismissed and closed. Judgment will be entered accordingly.

Baton Rouge, Louisiana, August 21, 1975.

/s/ E. GORDON WEST

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR.,
A MINOR, BY HIS FATHER AND NEXT
FRIEND, CLIFFORD EUGENE
DAVIS, SR., ETC., ET AL

VERSUS — CIVIL ACTION NUMBER 1662

EAST BATON ROUGE PARISH SCHOOL
BOARD, a Corporation, and LLOYD
FUNCHESS, as Superintendent of Public
Schools in East Baton Rouge Parish

JUDGMENT

This matter came on for hearing on a former day on motion of plaintiff-intervenor for supplemental relief. After due consideration of the evidence heard and the record made in this case, for the written reasons this day assigned:

IT IS ORDERED that the motion of plaintiff-intervenor for supplemental relief be, and it is hereby DENIED, and this entire suit is now DISMISSED.

Baton Rouge, Louisiana, August 21, 1975.

/s/ E. GORDON WEST

UNITED STATES DISTRICT JUDGE

APPENDIX B

DAVIS v. EAST BATON ROUGE PARISH SCH. BD.

Clifford Eugene DAVIS, Jr., et al., Plaintiffs,

Dr. D'Orsay Bryant and Alphonso O. Potter,

Plaintiffs-Intervenors-Appellants,

v.

EAST BATON ROUGE PARISH
SCHOOL BOARD et al.,
Defendants-Appellees.

No. 75–3610.

United States Court of Appeals,
Fifth Circuit.

April 7, 1978.

Intervenors in school desegregation case filed motion for supplemental relief, seeking further integration of East Baton Rouge Parish school. The United States District Court for the Middle District of Louisiana 398 F.Supp. 1013, E. Gordon West, J., dismissed case with prejudice, and intervenors appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) where district court failed to determine whether eradication of vestiges of past discrimination evidenced by one-race schools could be accomplished by remedial alternative desegregation methods, case would be remanded for such determination, and (2) where teacher reassignment plan, although facially neutral, led to placement of less experienced teachers in "black" schools and more experienced teachers in "white" schools, case would be remanded for making of specific findings concerning such plan, and (3) district court would be directed to consider and make

findings on other issues raised by intervenors' motion for supplemental relief.

Vacated and remanded with instructions.

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, TJOFLAT, and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

In the proceedings below, the district court found that the East Baton Rouge Parish school system is a unitary system being operated on a nondiscriminatory basis and dismissed this case with prejudice. The intervenors appeal from the district court's order; they claim that the school system is not and never has been unitary.[1]

Like so many school desegregation suits in this circuit, this case has been in the federal courts for many years. The suit was instituted in 1956, following the Supreme Court's decisions in *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the course of this protracted litigation, the district court has entered various injunctive orders, keeping pace with the evolving law in this area as espoused by the Supreme Court and this circuit.[2]

1. Dr. D'Orsay Bryant and Mr. Alphonso O. Potter were allowed to intervene as plaintiffs by the district court on December 19, 1969. Dr. Bryant, President of the Baton Rouge Chapter of the NAACP, and Mr. Potter, Regional Vice-President of the NAACP for the Sixth District, were both black citizens of the Parish and fathers of school-age children. In their motion to intervene, they alleged that the interests of local black children were not being properly and expeditiously represented. In 1974, the intervenors sought further integration of the East Baton Rouge Parish schools by filing a motion for supplemental relief. The district court's opinion denying this motion and dismissing the entire suit is reported at 398 F.Supp. 1013 (M.D.La.1975).

The East Baton Rouge Parish school system was last before this court in a consolidated case decided in 1967. *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) (en banc), *modifying*, 372 F.2d 836 (1966). This court remanded the case to the district court in 1967, with instructions that the district court enforce the affirmative duty of the

> boards and officials administering public schools . . . to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. . . The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students.

Id. at 389 (footnotes omitted). Following this court's remand, East Baton Rouge Parish operated a combined geographic zone and freedom-of-choice school assignment plan. *Davis v. East Baton Rouge Parish School Board*, 269 F.Supp. 60 (M.D.La.1967). Two years later,

2. In addition to the order of dismissal now on appeal, see note 1 *supra*, there have been three other reported decisions by the district court. These decisions can be found at 269 F.Supp. 60 (M.D.La.1967), 219 F.Supp. 876 (M.D.La.1963), and 214 F.Supp. 624 (M.D.La.1963).

this court held in *Hall v. St. Helena Parish School Board*, 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904, 90 S.Ct. 218, 24 L.Ed.2d 180 (1969), that a freedom of choice plan was unacceptable when it did not effectively desegregate the school system. Following the *Hall* decision, in 1970 the East Baton Rouge Parish School Board established a biracial committee, the Public Education Study Committee, which created two biracial subcommittees to consider separately the problems of student and faculty desegregation. The biracial committee formulated a proposed school desegregation plan that was unanimously approved by the school board and submitted to the district court, which adopted it on July 22, 1970. Second supp. record at 30. No appeal was taken.

The 1970 plan provided for desegregation of faculty, staff, transportation, extracurricular activities, student body composition, and school facilities. Student assignment was based primarily on the neighborhood school concept, under which children would attend the school closest to their place of residence. A majority-to-minority transfer provision was also incorporated into the plan, allowing a child attending a school in which the majority of students were of his race to transfer to a school in which he would be in the minority.

In 1974, the intervenors filed a motion for further relief. Drawn in general terms, the motion alleged that the 1970 plan was not desegregating the school system effectively. This contention was based primarily on two grounds. First, in East Baton Rouge Parish there still

exist many one-race or substantially one-race schools. Second, the present teacher reassignment plan, although desegregating the faculty, places less experienced teachers in the "black" schools, thereby allegedly lowering the quality of education.

On August 14, 1974, the district judge designated the Louisiana Educational Laboratory (LEL) as a court-appointed expert to assist the court in the case and directed LEL to file an interim report by January 1, 1975, indicating any immediate remedies that the court should impose. Based upon the recommendations made by LEL, the district court entered an interim order on February 26, 1975.[3] After the LEL filed its final report, the district court set a final hearing on the intervenors' motion for supplemental relief and challenge to the LEL study. This hearing was held on June 18, 1975. Four witnesses testified: the LEL officer who supervised the study, the school board superintendent, and two witnesses not directly involved in either the LEL study or the administration of the school system. At the conclu-

3. The district judge found that the school board had made "a good faith effort to comply with the prior orders of this Court, and to bring this school system into compliance with the Court's orders and with constitutional requirements." Record, vol. 1, at 110. Despite this finding, the judge ordered immediate school board action on several of the LEL recommendations: (1) the appointment of a second black to a high administrative position; (2) the provision of public transportation to complement the majority-to-minority transfer option; (3) the reorganization of the biracial committee, rendering it a court-appointed advisory body; and (4) the consideration of further planning in the areas of the magnet school concept, the restructuring of attendance zones, and the racial composition of the school board's central staff.

sion of the hearing, the district judge requested briefing from the parties.

On August 21, 1975, the district court handed down the order that is the basis of this appeal. 398 F.Supp. 1013 (M.D. La.1975). The district judge stated that the interim relief ordered in February had been fully complied with, that the biracial committee was in the process of studying further desegregation techniques (*e. g.*, alteration of attendance zones, reassignment of teachers, and clustering of schools), and that the school board had already done everything that the Constitution mandates in eliminating a dual school system. He declared the system to be unitary and held that under *Brown II*'s mandate that the federal courts retain jurisdiction over a school system pending its transition from a dual to a unitary system, the East Baton Rouge Parish school system was no longer appropriately within his jurisdiction. Accordingly, he dismissed the suit with prejudice.

I. Student Assignment

The main thrust of the intervenors' attack on East Baton Rouge Parish's school desegregation is the large number of substantially one-race schools. The record discloses that East Baton Rouge Parish School System serves both the city of Baton Rouge and the parish of East Baton Rouge. The parish contains 468.35 square miles, is irregularly shaped, and is approximately thirty miles from north to south and twenty miles from east to west. Along with the city of Baton Rouge, there are suburban and rural areas in the parish. There are ap-

proximately 70,000 students enrolled in the school system, of which some 36,000 are transported daily by provision of the school board. The racial mix is approximately sixty-five percent white, thirty-five percent black.

Of the approximately 110 schools in the system, twenty have student bodies comprised solely of black children. In addition, over half of the schools have student bodies that are ninety percent or more of one race, and over half of the black students attend schools that are substantially all black.

In its order dismissing the case, the court below commended the neighborhood school plan now utilized by the school board without determining whether further eradication of the vestiges of past discrimination, which are evidenced by the one-race schools, could be accomplished by means of the "desegregation tools" approved in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). *See also, Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *United States v. Mississippi*, 567 F.2d 1276 (5th Cir. 1978).

There is a presumption under *Swann* against the maintenance of a school system with substantially one-race schools. The Supreme Court declared as follows:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments

> are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

402 U.S. at 26, 91 S.Ct. at 1281. In the absence of explicit and specific findings by the district court, we are unable to determine whether the school board has met its burden and whether these schools have been subjected to the close scrutiny that is required prior to declaring that a school system passes constitutional muster. We therefore vacate the district court's order dismissing the case and remand the case for further proceedings. *See, e. g., United States v. South Park Independent School District*, 566 F.2d 1221 (5th Cir. 1978).

[1, 2] At a minimum, the district court on remand must evaluate whether any of the essentially one-race schools would be eliminated by the remedial altering of attendance zones or the pairing and clustering of noncontiguous school zones. *See Swann*, 402 U.S. at 27–29 & n. 10, 91 S.Ct. at 1281–82; *Lemon v. Bossier Parish School Board*, 566 F.2d 985 (5th Cir. 1978); *Cisneros v. Corpus Christi Independent School District*. 467 F.2d 142, 152–54 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044 (1973). These are only examples of the permissible tools that may be used to integrate a school system. The district court is directed to consider the possible alternatives to the neighborhood school concept and to make findings regarding the feasibility and efficacy of implementing one or a combination of these alternatives. As this court has

repeatedly stated, "The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir. 1977) (quoting *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975)).

II

[3] The second point raised by the intervenors concerns the present teacher reassignment plan, implemented pursuant to *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir.), *ref'd in part on other grounds sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970). The plan was designed to remedy the disproportionate racial balance of teachers in the schools. Although facially neutral, the plan has led to the placement of inexperienced teachers in the "black" schools and more experienced, and therefore allegedly more qualified, teachers in the "white" schools. This occurred because transfers were made in reverse order of seniority; the teacher in a particular school with the most seniority, whether white or black, is the last teacher to be transferred to another school. Two of the factors contributing to this imbalance in experience are the larger number of white teachers and the longer duration of black teachers in the school system. These factors create a larger pool of relatively inexperienced white teachers so that when they are "traded" for black teachers, the school system places a disproportionate

number of relatively inexperienced teachers into the "black" schools.

We reserve any decision on the teacher reassignment scheme utilized by the East Baton Rouge Parish school board. As stated previously, the biracial committee has been studying the present plan. The district court on remand is directed to consider the plan in light of the dual purposes involved: desegregation must be effected, and quality education must be promoted. Specific findings must be made by the district court on this aspect of the desegregation of the school system so that we can properly review the issue. *See Golf City, Inc. v. Wilson Sporting Goods, Inc.*

III

[4] As part of its inquiry on remand, the district court is directed to consider and to make findings on the other issues raised by the intervenors' motion for supplemental relief. These issues concern alleged discrimination in new school construction and site selection, funding of schools, and use of the biracial committee.

The judgment dismissing the case is vacated. The case is remanded for further proceedings and specific findings in accordance with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-3610

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Plaintiffs

DR. D'ORSAY BRYANT AND ALPHONSO O. POTTER,
Plaintiffs-Intervenors-Appellants,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING

(May 25, 1978)

Before COLEMAN, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

CERTIFICATE

I hereby certify that a copy of the above and foregoing Appendix to Petition for Writ of Certiorari was mailed, postage prepaid, to Robert C. Williams, 1822 North Acadian Thruway, W., Baton Rouge, Louisiana 70802, and Murphy W. Bell, Post Office Box 319, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this ´day of September, 1978.

JOHN F. WARD, JR.

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-302

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET. AL.,
Petitioners,

versus

CLIFFORD EUGENE DAVIS, JR., ET. AL.,
Plaintiffs,

DR. D'ORSAY BRYANT and
ALPHONSO O. POTTER,
Plaintiffs-Intervenors-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MURPHY W. BELL
P. O. Box 319
Baton Rouge, Louisiana 70802
ROBERT C. WILLIAMS
1822 North Acadian Thwy. (West)
Baton Rouge, Louisiana 70802
ATTORNEYS FOR RESPONDENTS

SCOFIELDS' QUALITY PRINTERS, INC., P. O. BOX 53098, N. O. LA. 70153 - 504/822-1811

CONTENTS

Page

QUESTION PRESENTED 1

ARGUMENT

A. The Appeals Court Remand For Specific Findings Of Fact Is Consistent With Rule 52(a) Of The Federal Rules Of Civil Procedure And *Swann v. Charlotte-Mecklenburg Board of Education* 2

B. The Appeals Court Remand With Instructions Is Consistent With The Requirement That A School System With A Long History Of State-Imposed Segregation Of The Races Be Subjected To Close Judicial Scrutiny In The Dismantling Process 4

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

CASES:

Brown v. Board of Education, 349 U.S. 249 (1955) (Brown II) 6

Dalehite v. United States, 346 U.S. 15, 24 (1953) 3

Davis v. East Baton Rouge Parish School Board, 380 F.2d 385 (1967) (En Banc) 7

Davis v. East Baton Rouge Parish School Board, 570 F.2d 1260 (April, 1978) 2

TABLE OF AUTHORITIES (Continued)

Page

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 4

Garner v. Louisiana, 368 U.S. 157, 179 (1961) 4

Hydrospace-Challenger, Inc. v. Tractor/MAS, Inc., 520 F.2d 1030 (1975) 3

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 2,4,6

United States v. DeSoto Parish School Board, 574 F.2d 804 (1978) 4

United States v. Jefferson County Board of Education, 380 F.2d 385 (Fifth Cir., 1967) (En Banc) 7

AUTHORITIES:

Rule 52(a), F.R.Civ.P. 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-302

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET. AL.,
Petitioners,

versus

CLIFFORD EUGENE DAVIS, JR., ET. AL.,
Plaintiffs,

DR. D'ORSAY D. BRYANT and
ALPHONSO O. POTTER, ET. AL.,
Plaintiffs-Intervenors-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I.

QUESTION PRESENTED

Whether the appeals court remand with instructions for specific findings of fact and conclusions of law

violates, or conflicts with, any rules of law and/or standards enunciated by the United States Supreme Court.

II.

ARGUMENT

A. The appeals court remand for specific findings of fact is consistent with Rule 52(a)[1] of the Federal Rules of Civil Procedure and *Swann v. Charlotte-Mecklenburg Board of Education.*

The unanimous opinion of the appeals court below, reported at 570 F.2d 1260 (April 7, 1978), and reprinted in it's entirety in the Appendix to the petition for Writ of Certiorari, beginning at Page 15, held:

---

1 RULE 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

> ". . . In the absence of explicit and specific findings by the district court, we are unable to determine whether the school board has met its burden and whether these schools have been subjected to the close scrutiny that is required prior to declaring that a school system passes constitutional muster. We therefore vacate the district court's order dismissing the case and remand the case for further proceedings. See, e.g. *United States v. South Park Independent School District,* 566 F.2d 1221 (5th Cir. 1978) (emphasis added). . . ."

It is respectfully submitted that the above holding is fully consistent with the letter and spirit of Rule 52(a) of the Federal Rules of Civil Procedure as interpreted and applied by this court in *Dalehite v. United States,* 346 U.S. 15, 24 N. 8 (1953), and followed by the appeals court below in the instant case, and others. See, e.g., *Hydrospace-Challenger, Inc. v. Tractor/MAS, Inc.,* 520 F.2d 1030 (1975).

In *Dalehite,* this court stated:

> ". . . The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts

on which the District Court relied. . . . Otherwise, their findings are useless for appellate purposes. . . ." at Page 24.

Additionally, this court required in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that in a school system, such as East Baton Rouge Parish, with a history of state-imposed segregation of the races must be subjected to close judicial scrutiny in converting to a unitary public school system. A fortiori, the requirement for specific, explicit findings of fact and conclusions of law is a necessary predicate to full appellate review.

B. The appeals court remand with instructions is consistent with the requirement that a school system with a long history of state-imposed segregation of the races, be subjected to close judicial scrutiny in the dismantling process.

At this point the respondents feel constrained to point out that this school system is not one where mandatory segregation of the races in public education has long since ceased. *Dayton Board of Education v. Brinkman*, 433 U.S. 406. Until 1957 state law required that the Louisiana public school systems be operated on a segregated basis. *United States v. DeSoto Parish School Board*, 574 F.2d 804; and see also this court's decision in *Garner v. Louisiana*, 368 U.S. 157, 179 (1961).

Historically, the East Baton Rouge Parish School System has contained racially identifiable and traditional one-race schools. The system is one characterized, generally, by a "feeder system", wherein elementary school children (Grades 1-6) pass on to junior high (Grades 7-9) and ultimately to high school (Grades 10-12).

McKinley High School was built for black children in the early 1920's and, although it's physical location has changed within a thirteen block area over the past fifty years, no white students in any measurable or significant numbers have ever attended. McKinley Senior High School and it's concomitant junior high and multiple elementary feeder schools remain, today, very much as they have been over the years, over ninety-eight percent (98%) black student enrollment.

Capitol High School was built for black children in the early 1950's. Over the years since it's opening, no white students in any measurable or significant numbers have ever attended Capitol. Capitol Senior High, and it's junior high school and multiple elementary feeder schools remain, today, very much as they have been over the years, over ninety-eight (98%) black student enrollment.

Scotlandville High School was built for black children in the late 1950's. Over the years since it's opening, no white students in any measurable or significant numbers have ever attended Scotlandville. Scotlandville Senior High and it's junior high school and multi-

ple elementary feeder schools remain, today, very much as they have been over the years, over ninety-eight percent (98%) black student enrollment.

Chaneyville High School was built in the late 1950's for black children. Over the years since it's opening, no white students in any measurable or significant numbers have ever attended Chaneyville High School. Chaneyville High School and it's junior high school and elementary feeder schools remain, today, very much as they have been over the years, over ninety-eight percent (98%) black student enrollment.

The preceding observations represent only a general analysis of four (4) of the five (5) historically black high schools and their "feeder" schools. Post 1970, one high school, Northwestern, was changed to a middle school. Between them, they account for well over sixty (60%) percent of the system's black students in enrollment. And, under the current operation they will never be exposed to a desegregated education.

Succinctly, the United States Court of Appeals for the Fifth Circuit has fulfilled it's role as mandated by this Court in *Brown v. Board of Education*, 349 U.S. 249 (1955) (Brown II) and *Swann*, supra, in requiring the district court to make specific and explicit findings of fact and conclusions of law. It's opinion clearly articulates it's paramount concern with the continuing vestiges of state-imposed segregation, as evidenced by, inter alia, the presence of numerous one-race and sub-

stantially one-race schools. Further, it must also be assumed that the appeals court's decision is also bottomed on it's knowledge that the East Baton Rouge Parish School Board has a history of evading it's affirmative duty to eradicate all vestiges of racial segregation within its system. See, *Davis v. East Baton Rouge Parish School Board*, consolidated with *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) (en banc).

CONCLUSION

Therefore, it is respectfully submitted that the decision of the United States Court of Appeals for the Fifth Circuit is eminently correct and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MURPHY W. BELL
P. O. Box 319
Baton Rouge, LA 70801
Phone: (504) 387-1750

ROBERT C. WILLIAMS
1822 N. Acadian Thwy. (West)
Baton Rouge, LA 70802
Phone: (504) 356-5252

Attorneys for Respondents

MURPHY W. BELL

CERTIFICATE

I hereby certify that three copies of the above and foregoing Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, to John F. Ward, Jr., 1111 South Foster Drive, Suite C, Post Office Box 65236, Baton Rouge, Louisiana 70896.

New Orleans, Louisiana, this ____ day of December, 1978.

MURPHY W. BELL